A

EMBASSY COURT SDN BHD

v.

YIP KUM FOOK & ORS; PRAKASH HARDASMAL KHIANI & ORS (INTERVENERS)

B

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[ORIGINATING SUMMONS NO: 24 NCVC-2237-08-2012]
20 NOVEMBER 2013

C

CIVIL PROCEDURE: *Mode of commencement - Whether correct originating process used - Substantial disputes on facts - Whether action should have been commenced by way of writ and not originating summons - Whether originating summons could be converted into writ action at later stage*

D

LEGAL PROFESSION: *Solicitors - Stakeholders - Contractual agreement - Solicitor acting for housing developer - Whether solicitor retained monies from purchasers as stakeholder - Whether there was unresolved claims regarding defects to property - Whether solicitor obliged to release monies to developer - Housing Development (Control and Licensing) Regulations 1989, reg. 11(1) - Housing Development (Control and Licensing) Act 1966, s. 22E*

E

The plaintiff was the developer of a block of condominiums ('condos') known as "The Avare". The condos had been completed and vacant possession of the same had been handed over to the respective purchasers. The sale and purchase agreements ('SPAs') signed by the
F plaintiff and its purchasers followed the standard Schedule H form prescribed under sub-reg. 11(1) of the Housing Development (Control and Licensing) Regulations 1989 made under the Housing Development (Control and Licensing) Act 1966 ('the Act'). The 3rd Schedule to Schedule H agreement provided for the schedule of payment of the
G purchase price. Item 5 of the Third Schedule provided that the last 5% of the purchase price was to be paid to the vendor's solicitors to hold as stakeholder after the date the purchaser had taken vacant possession of the unit. The defendant's firm was appointed by the plaintiff to be the vendor's solicitors to hold the stakeholding sum relating to 76 units
H of The Avare and the defendant's firm agreed to do so. The plaintiff now brought this action alleging that the defendant's firm was in breach of its stakeholding duty by not releasing a part of the stake to the plaintiff. *Vide* this originating summons ('OS') application, the plaintiff applied for an order that the sum of RM4,157,425.16, being the
I stakeholding sum ('the sum') relating to 32 units of The Avare held by the defendant's firm as stakeholder, be released to the plaintiff. The defendants contended that it would be contrary to the provisions of the

SPA and/or the Act if the sum was released to the plaintiff in the light of the unresolved claims regarding defects which were reported by the respective purchasers.

Held (dismissing application with costs):

(1) There were substantial disputes on facts. Hence, the proper mode of commencement should be by way of a writ action, and not by an OS. (para 11)

(2) The purpose of the sum was to ensure that the plaintiff's obligations had been discharged in relation to the defects reported by the purchaser within the defect liability period. If the purchaser filed a notice to the vendor to make good the defects during the defect liability period, the vendor must do so. If not, the purchaser can give notice to the vendor and proceed to make good the defects, and the purchaser can claim such sum expended from the vendor through deduction of the stakeholding sum. Hence, the defendants had a duty not to release the sum to the vendor unless the purchasers were satisfied with the work done by the vendor to make good the defects. (paras 13, 17 & 18)

(3) The plaintiff could not show satisfactory proof that the defects to the common property had been repaired by them. The amount required to make good all the defects for the common properties would be about RM25 million which amount was far more in excess of the sum. Therefore, the sum was not sufficient to cover the costs of the repairs to be done to the common properties let alone the individual units owned by the purchasers. (paras 20 & 21)

(4) Since the purchasers had given the requisite notices under the SPA, and the plaintiff and defendant had acknowledged the same, the stakeholders could not release the sum held by them without the consensus of both the plaintiff and the purchasers. Otherwise, the defendants would be committing an offence under s. 22E of the Act. Further, the defendants would be liable for breach of trust since they held the sum as trustees in a fiduciary capacity to both the plaintiff and the purchasers *(Datuk M Kayveas & Anor v. Bar Council;* refd). (paras 22 & 23)

(5) At this late stage, it was not fit to order that the OS be converted into a writ action. It was incumbent upon the plaintiff to carry out all the repairs complained of by the purchasers and make good the defects before any fresh writ action could be justified. (para 31)

Case(s) referred to:
Datuk M Kayveas & Anor v. Bar Council [2013] 7 CLJ 533 FC ***(refd)***

Legislation referred to:
Housing Development (Control and Licensing) Act 1966, s. 22E
Housing Development (Control and Licensing) Regulations 1989, reg. 11(1), sch. H

For the plaintiff - Anushiya Kuppusamy (Rajini Anndy with her); M/s Satha & Co
For the defendants - PS Koh; M/s Azim Tunku Farik & Wong
For the interveners - Viola Decruz; M/s VL DeCruz & Co

Reported by Amutha Suppayah

JUDGMENT

Yeoh Wee Siam J:

Enclosure 1

[1] This is the originating summons ("OS") filed by the plaintiff for the following orders:

(a) Jumlah sebanyak RM4,157,425.16 yang dipegang oleh Defendan-Defendan sebagai pemegang amanah ("stakeholders") berkenaan dengan projek Plaintif, yang dikenali sebagai "The Avare, Kuala Lumpur" di atas hartanah yang dikenali sebagai H.S (D) 110746, PT 53 Seksyen 63 (dahulu di bawah Geran 24550, Lot 305) Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan dilepaskan dan/atau dikembalikan kepada Plaintif dalam masa 14 hari dari tarikh perintah ini.

(b) Kos permohonan ini ditanggung oleh Defendan-Defendan; dan

(c) Perintah dan/atau relief selanjutnya yang Mahkamah Yang Mulia ini anggap adil dan suaimanfaat.

Background Facts

[2] The plaintiff is the developer of a block of condominiums ("condos") known as "The Avare". The condos have since been completed and vacant possession of the same has been handed over to the respective purchasers.

[3] The sale and purchase agreements ("SPAs") signed by the plaintiff and its purchasers followed the standard Schedule H form prescribed under sub-reg. 11(1) of the Housing Development (Control and Licensing) Regulations 1989 made under the Housing Development

(Control and Licensing) Act 1966 ("the Act"). The Third Schedule to the Schedule H agreement provides for the schedule of payment of the purchase price. Item 5 of the Third Schedule provides that the last 5% of the purchase price is to be paid to the "vendor's solicitors" to hold as stakeholder after the date the purchaser has taken vacant possession of the unit.

[4] By a letter dated 1 February 2009, the defendant's firm, Messrs Yip Kum Fook & Associates ("the defendant's firm"), was appointed by the plaintiff to be the "vendor's solicitors" to hold the stakeholding sum relating to 76 units of The Avare. The defendant's firm agreed to do so.

[5] *Vide* the OS in encl. 1, the plaintiff alleged that the defendant's firm is in breach of its stakeholding duty by not releasing a part of the stake to the plaintiff. The plaintiff applied for an order that the sum of RM4,157,425.16, being the stakeholding sum ("the sum") relating to 32 units of The Avare held by the defendant's firm as stakeholder, be released and/or returned to the plaintiff within 14 days from the date of the order.

[6] The defendants denied the plaintiff's allegations and maintained that it would be contrary to the provisions of the SPA and/or the Act if the sum relating to the 32 units of The Avare is released to the plaintiff in the light of the unresolved claims regarding defects which were reported by the respective purchasers.

[7] Out of these 32 units of The Avare, the purchasers of 19 units applied to intervene in this OS. Ten purchasers of nine units were allowed by the court on 23 July 2013 to intervene in these proceedings (note: one unit was co-owned by two persons).

[8] At the outset of the hearing, upon the application of counsel for three of the interveners ie, Prakash Hardasmal Khiani, Rachmat Lesmono Sidharta and Chong Li En, to withdraw their claim for intervention, the court accordingly struck off their claim with no order as to cost.

[9] The plaintiff's claim in respect of the 32 units was therefore reduced to the remaining 29 units.

Court's Decision Given On 16 October 2013 Regarding encl. 1

[10] The plaintiff's application regarding the remaining 29 units (ie, excluding three units namely, Units AV-08A, AV-24A and AV-18B) is dismissed. Costs of RM4,000 are to be paid by the plaintiff to the defendants and the remaining interveners jointly.

A **Grounds For The Court's Decision**

[11] The court finds that there are substantial disputes on facts. Hence, the proper mode of commencement should be by way of a writ action, and not by an OS. The court cannot allow the orders sought by the plaintiff based on mere affidavit evidence alone. This is a fit and proper matter for a full trial to be conducted, with *viva voce* evidence, where witnesses can be called and cross-examined. This will enable the court to make proper findings in regard to the facts which are seriously in dispute.

[12] Be that as it may, at this point, based on affidavit evidence alone, the court finds as follows:

[13] The defendants were made stakeholders for the sum under item 5 of the Third Schedule to the SPA which follows the standard Schedule H form under the Act. The purpose of the sum is to ensure that the plaintiff developer's obligations have been discharged in relation to the defects reported by the purchaser within the defect liability period.

[14] Out of the initial 35 units involved, the SPAs of 29 units were signed before the amendment to Schedule H to the Act came into force on 1 December 2007. Four of the SPAs were signed after the amendment came into force.

[15] *For Units Where The SPAs Were Executed Before 1 December 2007*

(a) The schedule of payment of the purchase price in relation to payment of the 5% stakeholding sum is as follows:

- 2.5% at the expiry of 6 months after the date the purchaser has taken vacant possession of the unit;
- 2.5% at the expiry of 18 months after the date the purchaser has taken vacant possession of the unit.

(b) Clause 30 of the SPA provides as follows:

> 30. Defect liability period
>
> (1) Any defects, shrinkage or other faults in the said Parcel or in the said Building or in the common property which shall become apparent within a period of eighteen (18) calendar months after the date the Purchaser takes vacant possession of the said Parcel and which are due to defective workmanship or materials or the said Parcel or the said Building or the common property not having been constructed in accordance with the plans and description as specified in the First and Fourth Schedule as approved or amended by the Appropriate

Authority, shall be repaired and made good by the Vendor at its own cost and expense within thirty (30) days of its having received written notice thereof from the Purchaser and if the said defects, shrinkage or other faults in the said Parcel or in the said Building or in the common property have not been made good by the Vendor, the Purchaser shall be entitled to recover from the Vendor the cost of repairing and making good the same and the Purchaser may deduct such costs from any sum which has been held by the Vendor's solicitor as stakeholder for the Vendor and subject to subclause (2), the Vendor's solicitors shall release such costs from such sum to the Purchaser within fourteen (14) days after receipt by the Vendor's solicitors of the Purchaser's written demand.

(2) The Purchaser shall, at any time after the expiry of the said period of thirty (30) days, notify the Vendor of the costs of repairing and making good the said defects, shrinkage or other faults before the commencement of the works and shall give the Vendor an opportunity to carry out the works himself within fourteen (14) days from the date the Purchaser has notified the Vendor of his intention to carry out the said works.

[16] *For Units Where The SPAs Were Executed After 1 December 2007*

(a) The schedule of payment of the purchase price in not relation to payment of the 5% stakeholding sum is as follows:

- 2.5% at the expiry of 8 months after the date the purchaser has taken vacant possession of the unit;
- 2.5% at the expiry of 24 months after the date the purchaser has taken vacant possession of the unit.

(b) Clause 29 of the SPA provides as follows:

Defect liability period

29(1) Any defect, shrinkage or other faults in the said Parcel or in the said Building or in the common property which shall become apparent within a period of twenty-four (24) calendar months after the date the Purchaser takes vacant possession of the said Parcel and which are due to defective workmanship or materials or; the said Parcel or the said Building or the common property not having been constructed in accordance with the plans and description as specified in the First and Fourth schedule as approved or amended by the Appropriate Authority, shall be repaired and made good by the Vendor at its own cost and expense within thirty (30) days of the Vendor having received written notice thereof from the Purchaser.

(2) If the said defect, shrinkage or other faults in the said Parcel or the said Building or the said common property have not been made good by the Vendor within the said period of thirty (30) days under subclause (1), the Purchaser shall be entitled to carry out the works to repair and make good the said defect, shrinkage or other faults himself and to recover from the Vendor the costs of repairing and making good the same the Purchaser may deduct such costs from any sum which has been held by the Vendor's solicitors as stakeholder for the Vendor under item 5 of the Third Schedule provided that the Purchaser shall, at any time after the expiry of the said period of thirty (30) days, notify the Vendor of the cost of repairing and making good the said defect, shrinkage or other faults before the commencement of the works and shall give the Vendor an opportunity to carry out the works himself within fourteen (14) days from the date the Purchaser has notified the Vendor of his intention to carry out the said works and provided further that the Purchaser shall carry out and commence the said works as soon as practicable after the Vendor's failure to carry out the said works within the said period of fourteen (14) days. In such an event, the Vendor's solicitors shall release such costs to the Purchaser from the stakeholder sum held by the Vendor's solicitors under item 5 of the Third Schedule within fourteen (14) days after receipt by the Vendor's solicitors of the Purchaser's written demand specifying the amount of such costs.

(3) Subject to subclause (2), where the Purchaser has, before the expiry of eight (8) months or twenty-four (24) months after the date the Purchaser takes vacant possession of the said Parcel as set out in item 5(a) and item 5(b) respectively of the Third Schedule, duly served on the Vendor's solicitors a copy of the written notice from the Purchaser to the Vendor under subclause (1) to rectify the said defect, shrinkage or other faults in the said Parcel or the said Building or the said common property, the Vendor's solicitors shall not release to the Vendor the relevant sum held by the Vendor's solicitors as stakeholder pursuant to item 5(a) and/or item 5(b) of the Third Schedule, as the case may be, until the Vendor's solicitors shall have received a certificate signed by the Vendor's architect, certifying that the said defect, shrinkage or other faults in the said Parcel or the said Building or the said common property have been repaired and made good by the Vendor.

[17] It is to be noted that whether the SPA was executed before or after the amendment was made on 10 December 2007 to the Schedule H form, the common feature is that if the purchaser files notice to the vendor to make good the defects during the defect liability period, the vendor must do so. If not, the purchaser can give notice to the vendor

and proceed to make good the defects, and the purchaser can claim such sum expended from the vendor through deduction of the stakeholding sum. The major difference between the former cl. 30 and the new amended cl. 29 of the SPA is that cl. 29 requires that the vendor's architect certifies that the defects have been repaired and made good by the vendor before the vendor's solicitor can release the sum to the vendor.

[18] For all the remaining 29 units, the defendants, as stakeholder, have a duty not to release the sum to the vendor unless the purchasers are satisfied with the work done by the vendor to make good the defects which arose during the defect liability period.

[19] The interveners contended that the plaintiff's claim is premature. The rectification to the defects of the units eg, wiring in some units, and to the common property eg, the façade of The Avare have not been carried out or resolved by the plaintiff. The joint management body ("JMB") of the condos have obtained a quotation for rectification and repairs of the common property which would cost RM25 million (exh. SYT3 of Sim Yong Teng's affidavit). The plaintiff did not respond to the JMB's request.

[20] The plaintiff could not show satisfactory proof that the defects to the common property have been repaired by them. As for repair of the respective units, it is noted that some of the complaint forms which the plaintiff alleged were signed by the purchasers (to confirm that the defects have been repaired) did not contain the names of the purchasers; some purchasers were still complaining that the defects have not been repaired (see plaintiff's first affidavit in reply affirmed on 12 October 2012 in encl. 4, exhs. MR13 to 18).

[21] Here, the remaining interveners have shown that the amount required to make good all the defects for the common properties, excluding the respective units, would be about RM25 million which amount is therefore far more in excess of the sum of RM4,157,425.16 now being kept by the defendants as the sum (see the affidavits of the individual interveners and the common affidavit affirmed by Sim Yong Teng for the common properties). Therefore, the sum of RM4,157,425.16 is not even sufficient to cover the costs of the repairs to be done to the common properties, let alone the individual units owned by the purchasers.

[22] Since the owners/purchasers, including the interveners have given the requisite notices under cl. 30 or cl. 29 of the SPA, as the case may be, and the plaintiff and defendant have acknowledged the same, the stakeholders cannot release the sum held by them without the consensus of both the plaintiff and the purchasers. Without such consensus, the

defendants cannot be compelled to release the sum to the plaintiff. Otherwise, the defendants would be committing an offence under s. 22E of the Act.

Section 22E of the Act provides as follows:

> **22E. Release of moneys by a stakeholder**
>
> (1) And stakeholder who releases any money to a housing developer or to any other person knowing that such an act is contrary to the provisions of the sale and purchase agreement shall be guilty of an offence and shall, on conviction, be liable to a fine which shall not be less than ten thousand ringgit but which shall not exceed one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.
>
> (2) Any person who knowingly and wilfully aids, abets, counsels, procures or commands the commission of an offence against subsection (1) shall be liable to be punished with the punishment provided for the offence.

[23] Furthermore, the defendants would be liable for breach of trust since they hold the sum as trustees in a fiduciary capacity to both the plaintiff and the purchasers (see Federal Court decision in *Datuk M Kayveas & Anor v. Bar Council* [2013] 7 CLJ 533).

[24] Here, what the plaintiff can do is to obtain the written confirmation of the purchasers concerned stating that the defects complained of have been repaired and made good to the satisfaction of the purchasers or the JMB, as the case may be, or a written instruction by the purchasers/the JMB to the defendants to release the sum to the plaintiff.

[25] It is noted that the defendants were made a party to these proceedings, but not all the purchasers. By right, the plaintiff should have made all the relevant purchasers as parties and not wait for them to apply to this court to be allowed as interveners to the action. The purchasers have a legal right to intervene since their interests in the stakeholding sum are directly affected by this action.

[26] The plaintiff contended that for the six units sold by public auction or by subsale ie, units AV-9B, AV-113, AV-13A, AV-17B, AV-32A and AV-32B, the written notice for all defects had already been given to the plaintiff before the first liability period of six months was over. Therefore, the new owners or new purchasers ("new purchasers") of such units have no right to instruct the defendants not to release the sum to the plaintiff. This is because the new purchasers had purchased the units on "as is where is" basis, which means all rights, interests and benefits under the SPAs executed between the plaintiff and the

original purchasers had terminated the moment the units were sold to the new purchaser. Alternatively, the plaintiff contended that after the defect liability period, the new purchasers have no right to direct the defendants to retain the sum any longer.

[27] The court agrees with the submission of counsel for the defendants that since all these units had been sold by a deed of assignment ("DOA") (eg, p. 160 of exh. MR6 of encl. 4), by virtue of cls. 1 and 2 of the DOA, the assignor had assigned to the assignee all his rights, title, benefits, obligations etc absolutely. The position is as if the assignee has been made a party with the plaintiff developer in the principal SPA in place of the assignor.

[28] Counsel for the plaintiff submitted that they do not dispute cls. 1 and 2 of the DOA. However, the plaintiff's contention is that the plaintiff has rectified the defects complained of during the defect liability period. Therefore, the sum should be released to the plaintiff.

[29] The court is of the opinion that for as long as there is a serious dispute between the plaintiff and the purchasers on whether the plaintiff had in fact repaired and made good the defects, in particular the common properties, and in the absence of cogent evidence that the plaintiff has repaired and made good the defects, the defendants have a legal duty to retain the stakeholding sum unless they are given a written instruction or confirmation from the relevant purchasers to release the same to the plaintiff.

[30] As pointed out by counsel for the defendants, some of the auction or subsale transactions were not within the knowledge of the defendants since they were not informed of the same. The defendants only became aware of the subsequent transactions upon receipt of the plaintiff's affidavits in reply in encl. 4. The defendants were unable to confirm whether such auctions or subsales are complete. The defendant's records still show the names of the original/previous purchasers of the units. Thus, the defendants would be putting themselves at risk if they were to comply with the plaintiff's demand for the release of the sum to them.

[31] At this late stage, the court does not deem it fit to order that this OS be converted into a writ action. It is incumbent upon the plaintiff to carry out all the repairs complained of by the purchasers and make good the defects before any fresh writ action can be justified.

[32] Based on the above considerations, the court ordered accordingly.